QUESTION PRESENTED

Whether the state may use the Establishment Clause as an excuse to censor private persons' and organizations' religious speech in a public forum, despite the Free Speech Clause's general prohibition of content-based restrictions on speech in public fora?

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In The

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-780

CAPITOL SQUARE REVIEW AND ADVISORY BOARD, RONALD T. KELLER, DANIEL SCHELLENBARGER, AND OHIO SENATOR RICHARD T. FINAN,

Petitioners,

v.

VINCENT J. PINETTE, DONNIE A. CARR, AND KNIGHTS OF THE KU KLUX KLAN,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE AMERICAN CENTER FOR LAW & JUSTICE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS *

The American Center for Law and Justice ("ACLJ") is a national, nonprofit legal organization whose purpose is to preserve, protect, and promote religious liberty through education, legal defense, legislative assistance, and related

*. The parties in this case have consented to the filing of this brief by letters of consent filed with the Clerk of the Court.

activities. ACLJ attorneys specialize in advocating the rights of freedom of speech, conscience, and religion. The ACLJ's Chief Counsel has argued cases before this Court dealing with issues related to this case. Included among those cases are *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993) and *Board of Education v. Mergens*, 496 U.S. 226 (1990), both of which the Sixth Circuit properly relied upon in its decision in this case.

The ACLJ files this brief in support of the respondents because the State of Ohio's argument, an argument echoed in other cases—that government may censor private religious speech in a public forum for fear that some may mistakenly attribute that speech to the state and conclude the state is endorsing a particular religious belief—is antithetical to the First Amendment Free Speech Clause and is dangerous to the free speech rights of religious speakers. The ACLJ supports the Sixth Circuit's holding that truly private religious speech in a public forum cannot violate the Establishment Clause.

SUMMARY OF ARGUMENT

1. The Establishment Clause, made applicable to the states by the Due Process Clause of the Fourteenth Amendment, restricts only government action. The state of Ohio[1] has not compelled, encouraged, assisted, sponsored, supported, endorsed, or given special preference to the Klan's expression. By allowing the Klan to erect its cross, the state merely would have been allowing the Klan to exercise its right to free speech. This Court's state action cases, from *Shelley v. Kraemer*, 334 U.S. 1 (1948), to the

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1. For ease of reference, we will refer to the Petitioners, a state agency and members of that agency, as the "state."

present have made clear that a state generally is not responsible for private action—that is, that private action is not state action—unless the state has compelled or significantly encouraged that private action. Merely allowing a private actor to perform an action that would violate the Constitution if performed by the state is not state action. Because the state would neither have been compelling nor encouraging the Klan's expression by simply allowing that expression in a public forum (the same way the state must allow any other speech in a public forum), allowing the Klan to erect its cross would not have been state action, and therefore could not have violated the Establishment Clause.

2. Even if merely allowing private speech in a public forum is sufficient state action to warrant constitutional scrutiny, allowing private speech in a public forum does not violate the Establishment Clause. The state argues that the existence of a religious symbol on public property may send a message of state endorsement for religion. This Court has rejected this very argument three times. See *Widmar v. Vincent*, 454 U. S. 263 (1981); *Board of Education v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1943). In any event, the state does not endorse speech merely by allowing that speech in a public forum because it is unreasonable to conclude, given that the Free Speech Clause does not allow content-based speech restrictions of speech in public fora, that the state endorses speech it fails to censor. The state must thus depend on the argument that some hypothetical observer might perceive that the state is endorsing speech it allows in a public forum. But this "perceived endorsement" argument is flawed. It blurs the line between state and private action, at the expense of private speech rights. It makes free speech rights depend on

the uniformed perceptions of others, thus importing into free speech jurisprudence an "Ignoramus's Veto" akin to the heckler's veto this Court has long rejected. The "perceived endorsement" test also targets religious speakers for special disabilities, despite this Court's admonition in *Mergens*, 496 U. S. at 248, that the Establishment Clause does not license government to target religious speakers for unique disabilities. In short, the state's Establishment Clause argument is merely a rationalization for censoring disfavored religious speech; this Court ought to reject that rationalization out of hand.

I. THE ESTABLISHMENT CLAUSE RESTRICTS ONLY GOVERNMENT ACTION; MERELY ALLOWING FREE SPEECH, WITHOUT COMPELLING OR ENCOURAGING THAT SPEECH, IS NOT SUFFICIENT GOVERNMENT ACTION TO IMPLICATE THE ESTABLISHMENT CLAUSE.

The essential facts in this case are simple and few. The Ku Klux Klan, a private organization, sought, without any governmental encouragement, assistance, sponsorship, or support, to erect a Latin Cross on Capitol Square in Columbus, Ohio. The state refused to allow the Klan to erect its cross because the cross's message is religious. Capitol Square, as the state concedes (see Petition for Certiorari at 4), is a public forum, which for many years has been available for speech and expressive activity (including the erection of free-standing displays[2]) by many different groups.

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2. The state does not (and cannot) contest that the Klan's public display of a Latin cross constitutes an exercise of the right to freedom of speech. Cf. *R.A.V. v. City of St. Paul*, 112 S.Ct. 2538,

See *Pinette v. Capitol Square Review and Advisory Board*, 844 F. Supp. 1182, 1183-85 (S.D. Ohio 1993).

2541-42 (1992) (burning a cross is protected expressive activity); *Texas v. Johnson*, 491 U.S. 397, 402-06 (1989) (flag burning is protected expressive conduct). This Court has recognized the powerful, emotive force of such displays of symbols and emblems. *See, e.g., Johnson*, 491 U.S. at 405. Furthermore, the Klan's display of a Latin Cross is consistent with historic antecedents. Phillip Davidson, *Propaganda and the American Revolution* 184-86 (UNC Press 1941). Those who fomented revolution and founded our Republic were, like the Klan here, convinced that such publicly displayed emblems served powerfully to bring cohesion to the colonists. Thus, the practice of publicly erecting a Liberty Pole, a Liberty Pillar, or a Liberty Tree, was widely adopted. *Id.* at 185-86.

And just as the Klan's activity here has led to controversy, so too did the symbolic displays of emblems by our revolutionary forbearers. For example,

> The New York Sons of Liberty had a trying time with their Liberty Pole. One was erected in 1766 on city property but was later destroyed, and the city officials refused to allow another to be set-up, even if it was given to the city. The Liberty Boys then bought a piece of ground and raised one, but the troops attacked it. This time, the Liberty Boys were on hand, and a fight ensued, the Golden Hill affair, in which several people were hurt.

Davidson, at 185-86 (footnote omitted).

Certainly the average colonist did not think that parliament, crown, or colonial governors had erected the Liberty Poles. Certainly the average Ohioan would not have thought the state had erected the Klan's Latin Cross.

The state asserts that it had to censor the Klan's religious expression because allowing the cross in Capitol Square would have violated the First Amendment's Establishment Clause. That clause provides that "*Congress* shall make no law respecting an establishment of religion . . . . " U.S. Const. amend. I, cl. 1 (emphasis added). This Court has held that the Establishment Clause's restriction on Congressional power is applicable to the states by virtue of incorporation through the Due Process Clause of the Fourteenth Amendment. *Wallace v. Jaffree*, 472 U.S. 38, 49-51 (1985). The Due Process Clause provides that no "*State* [shall] deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, sec. 1, cl. 3 (emphasis added).

Like most constitutional provisions protecting individual liberty (the major exception being the Thirteenth Amendment, which prohibits slavery), the First and Fourteenth Amendments restrict only government action. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991). "This fundamental limitation on the scope of constitutional guarantees 'preserves an area of individual freedom by limiting the reach of federal law' and 'avoids imposing on the State . . . responsibility for conduct for which [it] cannot fairly be blamed.'" *Id.* (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-37 (1982)). Individual and private associational freedom—the freedom of the Klan and its members to enjoy the same free speech rights as any other citizens—is the crux of this case. On their face, the Establishment and Due Process Clauses make plain that if the Ku Klux Klan wants to promote "Christianity,"[3] those

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3. This is not to say that we agree that the Klan promotes Christianity in any meaningful sense of the word. The district court

constitutional provisions have nothing to say about the matter. But the state seeks to curtail the Klan's freedom to speak by having this Court impose responsibility on the *state* for the religious message of the Klan's speech, thereby allowing the state to exclude that speech from a public forum.

This Court implicitly recognized that the Establishment Clause reaches only governmental action when it recognized the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990). The speech at issue in this case is private speech, not government speech. The state did not seek to endorse religion by erecting a cross in Capitol Square; the Klan did. The state neither coerced nor encouraged the Klan to put up a cross in Capitol Square. The state did not help pay for the Klan's expression, sponsor that expression, or endorse that expression. If the state had allowed the cross, it would not have been giving the Klan's religious expression

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in this case summed up the feelings of most reasonable people about the Klan but, perhaps more importantly, also summed up the role those feelings should play in determining the Klan's free speech rights:

> It is ironic and in the most literal sense diabolical that a group bearing this name would seek to publicly display the symbol of Jesus of Nazareth known to Christians and non-Christians alike as the Prince of [P]eace. It should be obvious, however, that the constitutional right of freedom of speech would be meaningless if it did not apply equally to all groups, popular and unpopular alike.

844 F.2d at 1187.

any special preference, since a state generally may not restrict or exclude speech in a public forum based on the content of the speech. See *Perry Educational Association v. Perry Local Education Association,* 460 U. S. 37, 45 (1983).

In essence, the state argues that simply allowing religious speech in a public forum—or, put another way, allowing religious speakers to exercise their free speech rights—is sufficient state action to implicate the Establishment Clause. But this Court's cases firmly establish that merely allowing a private party to do an act that would violate the Constitution if done by the state does not make the private act state action for which the state is responsible.

This Court recognized this point in *Shelley v. Kraemer*, 334 U.S. 1 (1948). In *Shelley,* property owners sought to convey their property to black buyers despite restrictive covenants forbidding sales to blacks. State courts enforced the restrictive covenants, in effect requiring the sellers to discriminate against the black buyers. *Id.* at 4-7. This Court held that the state courts' enforcement of the covenants amounted to state action depriving the buyers of equal protection of the laws. *Id.* at 23.

Shelley did not hold that the restrictive covenants themselves violated the Equal Protection Clause. In fact, the Court noted that private adherence to the covenants would not have violated the Clause. *Id.* at 13. In *Shelley*, the state courts, by enforcing the covenants, were compelling the sellers to discriminate rather than merely allowing them to discriminate. The Court made this distinction clear:

> [T]hese are not cases . . . in which the states have merely abstained from action, leaving private

> individuals free to impose such discriminations as they see fit. Rather, these are cases in which the states have made available to such individuals the full coercive power of the government to deny petitioners, on the grounds of race or color, the enjoyment of property rights . . . which the grantors are willing to sell.

Id. at 19.

Subsequent cases from this Court highlight this distinction. For example, in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), this Court held that Pennsylvania's extensive regulation of the operations of private clubs serving alcoholic beverages did not constitute state action implicating Pennsylvania in a Moose Lodge's policy of refusing to serve black guests. See *id.* at 171-79. Although state regulation of private clubs was pervasive, this Court held that the regulations, with one exception, did not "in any way foster or encourage racial discrimination." *Id.* at 176-77. The one exception was an administrative regulation requiring the Lodge as a condition of its liquor license to "adhere to all provisions of its Constitution and By-Laws." *Id.* at 177 (internal quotation and citation omitted). Because the Moose Lodge's constitution required racial discrimination, the regulation requiring adherence to that constitution compelled the Lodge to discriminate; thus, the Court struck down that regulation to the extent it required Moose Lodge to comply with its discriminatory constitution. See *id.* at 178-79 ("the result of [the regulation's] application in a case where the constitution and bylaws of a club required racial discrimination would be to invoke the sanctions of the State to enforce a concededly discriminatory private rule").

In *Flagg Brothers, Inc. v. Brooks*, 436 U.S. 149 (1978), a woman sued to enjoin a private warehouseman from selling property pursuant to a New York statute that allowed warehousemen to sell goods to recoup unpaid storage charges. The woman alleged that the sale would violate the Due Process Clause. *Id.* at 153. The woman argued that the sale amounted to state action because the New York statute "authorized and encouraged it." *Id.* at 164. This Court scotched that argument, holding that "'a state is responsible for the . . . act of a private party when the state, by its law, has compelled the act.' This Court, however, has never held that a state's mere acquiescence in a private action converts that action into that of the state." *Id.* at 164 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 170 (1970)).

Other cases from this Court reiterate the point that a state is not responsible for a private action the state merely has allowed rather than compelled or encouraged. Thus, for example, in *San Francisco Arts & Athletics v. United States Olympic Committee*, 483 U.S. 522, 546-47 (1987) this Court found no state action in the USOC's choice of how to enforce its governmentally-conferred exclusive right to use the word "Olympic" where there was "no evidence that the Federal Government coerced or encouraged the USOC in the exercise of its right." In *Blum v. Yaretsky*, 457 U.S. 991, 1002-12 (1982), this Court held that the state was not responsible for doctors' decisions regarding the level of nursing home care Medicaid patients are entitled to receive, despite extensive state funding and regulation of those nursing homes. And in *Rendell-Baker v. Kohn*, 457 U.S. 830, 837-43 (1982), the Court held that the state was not responsible for a private school's firing of a teacher, despite the fact that public funds accounted for 90% to 99% of the school's budget and the school's students were placed in the school by the state.

This Court's state action cases teach generally that a state "'normally can be responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [state].'" *San Francisco Arts & Athletics*, 483 U.S. at 546 (citing *Blum*, 457 U.S. at 1004); see also *Lebron v. National Railroad Passenger Corporation*, 115 S.Ct. 961, 979 (1994) (O'Connor, J., dissenting) ("the conduct of a private actor is not subject to constitutional challenge if such conduct is fundamentally a matter of private choice"). In other words, the state is not responsible for private conduct that it has neither coerced nor encouraged. It follows that merely allowing a private citizen to express himself , without more, does not make the state responsible for that expression.

This general rule—distinguishing private initiative from government compulsion—developed for the most part in cases involving racial discrimination, an action the Constitution does not affirmatively protect. See, e.g., *Irvis*, 407 U.S. at 176-77. Where the state, as in this case, merely allows a citizen to exercise his constitutionally protected right to free speech, it would be counterintuitive to hold the state responsible for that speech and its content. The whole point of the Free Speech Clause is to prevent government from interfering with the right to free speech. If the state is not responsible for private action the state could have proscribed, the state could not be responsible for private action it has no right to proscribe in the first place. Since the state in this case in no way compelled or encouraged the Klan's religious expression, the state cannot be responsible for that expression. Thus, the Klan's expression could not violate the Establishment Clause.

This Court's decision in *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), does not require a different result. In *Burton*, a Delaware state agency leased space in a parking garage to a private restauranteur, which proceeded to discriminate against black customers. This Court cited a number of factors, including the fact that the state stood to profit from the restaurant's discrimination, *id.* at 723-24, which led the Court to conclude that the state had "so far insinuated itself into a position of interdependence with [the restaurant] that it must be recognized as a joint participant in the challenged activity. . . ." *Id.* at 725. The facts in this case bear no resemblance to the facts in *Burton*. Certainly, the state is not claiming that it has "insinuated itself into a position of interdependence with" the Klan.

The *Burton* Court did state that "[b]y its inaction, the Authority . . . has elected to place its power, property, and prestige behind the admitted discrimination." *Id.* at 725. But when the Court referred to "inaction," it was referring to the state's failure to require the restaurant "to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise *as a consequence of state participation.*" *Id.* (emphasis added). In other words, a state may not enter a joint venture with a private party and then wash its hands of any constitutional violations the private party commits. The state's "inaction" thus is relevant only when state participation in a venture is present in the first place. Here, there was no state participation in the Klan's speech. In any event, more recent cases such as *Irvis*, *Flagg Brothers*, and *Blum* firmly establish that absent the type of unusual circumstances found in *Burton*, a state's merely allowing private activity does not make the state responsible

for that activity.[4] That would seem to be especially so in a case such as this, since "inaction" regarding the content of a citizen's expression is precisely what the Free Speech Clause commands. See *R.A.V v. City of St. Paul*, 112 S.Ct. 2538, 2542 (1992) (content-based regulation of speech is presumptively invalid); *Perry Education Association*, 460 U. S. at 45.

Nor does *Edmonson v. Leesville Concrete Co.*, 111 S.Ct. 2077 (1991) require a finding of state action in this case. In *Edmonson*, this Court held the State responsible for a private litigant's racially discriminatory exercise of peremptory challenges in a civil case. See *id.* at 2082-87. One could argue that when a court strikes a juror on a litigant's exercise of a peremptory challenge, the state merely is allowing private action. But *Edmonson* did not hold that merely allowing private action constitutes state action. Instead, the *Edmonson* Court emphasized that "a private party could not exercise its peremptory challenge absent the overt, significant assistance of the court." *Id.* at 2084. In this respect, *Edmonson* applied the holding in *Shelley v. Kraemer* that a state violates the Equal Protection Clause when it uses its courts' coercive power to give effect to private discrimination. See *Lebron*, 115 S. Ct. 980 (O'Connor, J.,

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4. Whether *Burton* even retains any vitality is questionable. See *Lebron*, 115 S. Ct. at 979 (O'Connor, J., dissenting) (citing Laurence Tribe, *American Constitutional Law* §f 18-3, at 1701 n. 13 (2d ed. 1988)). In any event, the *Burton* Court itself recognized that its holding was narrow, emphasizing that its decision depended on the peculiar facts of that case. See *Burton*, 365 U.S. at 726. This Court in a later case noted that *Burton* had limited its holding "to lessees of public property." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 358 (1974). See *Lebron*, 115 S. Ct. at 979 (O'Connor, J., dissenting).

dissenting). Moreover, *Edmonson* emphasized that jurors exercise traditional government functions, so that when a government allows litigants peremptory challenges, the government "confers on a private body the power to choose the government's employees or officials. . . . " 111 S. Ct. at 2085. Private parties to whom the government delegates the power to choose government officials must exercise that power in a race-neutral manner. *Id.*

Neither of the rationales relied on by *Edmonson* justifies a finding of state action in this case. A speaker, even in a public forum, need not await the state's overt and significant assistance in exercising his right to free speech. *Shelley's* coercion rationale does not apply in this case because the state has not coerced the Klan to speak. Moreover, the Free Speech Clause and this Court's public forum cases make clear that choosing the content of a citizen's expression in a public forum is not a traditional government function.

The lack of state action here distinguishes this case from this Court's holding in *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989), that a creche display inside the Allegheny County Courthouse violated the Establishment Clause. Because the creche was not displayed in a public forum, *Allegheny* involved elements of preference or favoritism, which can be construed as government endorsement or encouragement. See *id.* at 600 n. 50. It is only because of this preference that the government in *Allegheny* could be said to have done more than merely allowing citizens to exercise their free speech rights. *Allegheny* thus involved state action that is not present in this case.

The understanding that only state action can violate the

Establishment Clause, and that merely allowing religious speakers to exercise their free speech rights does not constitute state action, also resolves the "tension" the state perceives between the Free Speech and Establishment Clauses. The Free Speech Clause commands that government must allow private speech in a public forum despite its content; only government action violates the Establishment Clause; merely allowing private speakers to speak in a public forum does not make the government responsible for the private speech; thus, merely allowing speech in a public forum does not violate the Establishment Clause. This is the primary reason the Sixth Circuit was correct when it effectively held in this case that truly private speech in a public forum cannot violate the Establishment Clause; truly private speech—speech the state has not compelled or encouraged—is not state action. Any "tension" this holding creates between the Establishment and Free Speech Clauses is a figment of the state's imagination.[5] Because the mere act of allowing private speech in a public forum is not state action sufficient to implicate the Establishment Clause, this Court should affirm the Sixth Circuit's decision that private speech in a public forum does not violate the Establishment Clause.

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5. Likewise, the state action requirement answers the Second Circuit's concern, echoed by the state, that the public forum doctrine may somehow "swallow up the Establishment Clause." *Kaplan v. City of Burlington*, 891 F.2d 1024, 1029 (2d Cir. 1989). Private speech in a public forum—speech for which the state is not responsible—cannot "swallow up" a restriction on government conduct. The Sixth Circuit, unlike the second, merely has recognized the "crucial difference between *government* speech. . . and *private* speech" (*Mergens*, 496 U.S. at 250) that is necessary for purposes of constitutional analysis.

II. THE STATE'S ARGUMENT THAT IT MUST CENSOR THE KLAN'S RELIGIOUS EXPRESSION LEST AN OBSERVER CONCLUDE THAT THE STATE ENDORSES CHRISTIANITY IS INCONSISTENT WITH THIS COURT'S PRECEDENT, CONFLICTS WITH THE FREE SPEECH CLAUSE, AND PERPETUATES DISCRIMINATION AGAINST RELIGIOUS SPEAKERS.

A. This Court Three Times Has Rejected the State's Endorsement Argument.

Even assuming that merely allowing private religious speech in a public forum is somehow state action subject to constitutional scrutiny, that action does not violate the Establishment Clause. The state argues that the existence of a religious symbol on public property may send a message of endorsement for the religious sentiment expressed by that symbol. But even assuming state action, this argument still ignores the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Education v. Mergens*, 496 U. S. 226, 250 (1990).

The Establishment Clause does not forbid private citizens such as the Klan and its members from endorsing religion, and the state has not actually endorsed the Klan's message. Thus, how does the Klan's message become the state's message? The state's argument must rest on one of two bases. The first of these bases is that merely allowing private religious expression in a public forum can somehow by itself constitute actual governmental endorsement of that religious

expression. This concept of "actual" endorsement rests on the notion that government endorses speech that it does not censor. If this first basis crumbles, the second basis for the state's endorsement argument must be that even if the state cannot be said to have actually endorsed the Klan's speech, observers in the general public may not realize that government does not endorse expression it fails to censor or that the Klan's expression is private expression. Thus, observers in the public may perceive governmental endorsement of religion even if no actual endorsement exists; and the possibility of this "perceived endorsement" is sufficient in itself to violate the Establishment Clause.

Arguments of this flavor have been presented to and rejected by this Court several times. In *Widmar v. Vincent*, 454 U. S. 263 (1981), this Court held that when a state university creates an open forum for student groups to meet, it may not deny use of that forum to students who want to meet for religious discussion or worship. *Id.* at 267-77. The state in *Widmar* argued that to allow religious groups to use the open forum would violate the Establishment Clause. The Court rejected this argument primarily because of the broad range of speech allowed in the forum. When government facilities are open generally for speech purposes, allowing religious speakers to use those facilities "does not confer any imprimatur of State approval on religious sects or practices." *Id.* at 274. Allowing access to an open forum to religious groups no more commits the state to religious goals than it does to the goals of any other group using the forum. See *id.*

In *Mergens*, this Court upheld the constitutionality of the Equal Access Act, 20 U. S. C. § 4071-74 (1988). That Act generally prohibits public secondary schools that provide opportunities for non-curriculum-related student groups to

meet from discriminating against student groups based on the religious, political, or philosophical content of the students' speech. See generally *id.* This Court rejected the school district's "perceived endorsement" argument in *Mergens*. The Court found that the proposition that the government does not endorse all it fails to censor "is not complicated," 490 U. S. at 250, and that students would likely understand that by allowing religious speech on the same terms as other speech, the school is not endorsing that speech. See *id.* Indeed, this Court found that the Act's open-access policy does not send any message of endorsement: "[A] school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion." *Id.* at 252.

Finally, in *Lamb's Chapel v. Center Moriches Union Free School District,* 113 S. Ct. 2141 (1993), this Court held that discriminating against religious speakers in granting access to public facilities violates the Free Speech Clause. The defendants in *Lamb's Chapel,* like the state in this case, attempted to justify their discrimination by arguing that allowing the religious speech would have violated the Establishment Clause because it was possible that the community would think the district was endorsing religion. Finding "no realistic danger" of perceived endorsement, *id.* at 2148, the Court had "no. . .trouble" rejecting the state's argument. *Id.*

Widmar, Mergens, and *Lamb's Chapel* all rejected the notion that government may discriminate against private speech so that observers will not infer the government endorses that speech by permitting it. These cases establish that allowing private religious speech on the same terms as

any other speech does not violate the Establishment Clause. There is no sound reason for this Court to accept the state's endorsement argument in this case after rejecting similar arguments in *Widmar, Mergens,* and *Lamb's Chapel*. In fact, an examination of that argument's premises and implications reveals an argument this Court should reject as fundamentally at war with the Free Speech Clause and the free speech rights of religious speakers.

B. The State's Argument is Inconsistent With The Free Speech Clause.

As noted, any argument that the state actually has endorsed the Klan's religious expression in this case must rest on the premise that the state endorses all speech in a public forum that it fails to censor. That premise is sound only if government has a right to censor speech in a public forum in the first place. But the Free Speech Clause prohibits content-based censorship in public fora; consequently, the notion that the government endorses all speech in a public forum that it fails to censor is "absurd." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers*, 81 NW. U. L. Rev. 1, 14 (1986). It denies reality to suggest that government endorses the wildly divergent views expressed in a public forum—including views critical of the government—merely because the government refuses to violate the Constitution by suppressing those views. This holds just as true for religious speech as it does for any other speech. Cf. *Widmar,* 454 U. S. at 274 (an open access policy '"would no more commit the [state]. . . to religious goals,'" than it would commit the state to the goals of "any other group eligible to use its facilities") (citation omitted).

The endorsement argument's fallback position is that, even if the state cannot be said to endorse all it permits, observers in the general public may not know that, or may not realize that private speech in a public forum actually is private. Thus, observers may perceive endorsement, even where none exists. But this "perceived endorsement" argument allows a private citizen's free speech rights to depend on the misperceptions of others. The "perceived endorsement" argument thus smuggles back into free speech jurisprudence something akin to the heckler's veto. By way of the heckler's veto, states would attempt to justify silencing speakers because of the possibility that their otherwise constitutionally-protected speech would provoke an unruly response from listeners. See, e.g., *Texas v. Johnson*, 491 U.S. 397, 401 (1989); *Street v. New York*, 394 U. S. 576, 592 (1969). This Court has rejected that rationale for censorship. See *Johnson*,491 U.S. at 408-10; *Street*, 394 U.S. at 592; cf. *Coates v. City of Cincinnati*, 402 U. S. 611, 615 (1971) ("our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms [of assembly and association]"). Police may not squelch an unpopular speaker simply because his speech may make a crowd unruly. Instead, "the police must permit the speech and control the crowd." *Hedges v. Wauconda School District*, 9 F.3d 1295, 1299 (7th Cir. 1993); see *Brown v. Louisiana*, 383 U.S. 131, 133 n. 1 (1966) (plurality opinion) ("Participants in an orderly demonstration in a public place are not chargeable with the danger that, unprovoked except by the fact of the constitutionally protected demonstration itself, their critics might react with disorder or violence"); cf. *Schneider v. State*, 308 U. S. 147 (1939) (if leafletting causes litter, proper response is to punish the litterbug, not censor the leafletter).

Just as it has rejected the heckler's veto, this Court should reject what the Sixth Circuit aptly termed the "Ignoramous's Veto," that the state seeks to smuggle into free speech jurisprudence by way of its "perceived endorsement" argument. *Americans United for Separation of Church and State v. Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (en banc). Just as the heckler's veto left a person's free speech rights at the mercy of bystanders who disagreed with the speech, so the "Ignoramous's Veto" leaves religious speech rights at the mercy of "those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine." *Id.* (quoted in *Pinette v. Capitol Square Review and Advisory Board*, 30 F.3d 675, 679 (6th Cir. 1994)). As the Seventh Circuit put it, "just as bellicose bystanders cannot authorize the government to silence a speaker, so ignorant bystanders cannot make censorship legitimate." *Hedges*, 9 F.3d at 1299-1300.

If the state is concerned that some of its citizens do not understand free speech rights and thus might perceive that the state is endorsing religious speech it does not censor, the state should educate its citizens about the Free Speech Clause and explain that the only thing it is "endorsing" is the right of all citizens to speak freely. But if some fail to get the message, censorship still is not the proper response. "Private errors do not justify discrimination against speech. Otherwise, some persons' failure to understand the meaning of the first amendment. . . would become an occasion for curtailing the scope of that amendment." *Doe v. Small*, 964 F.2d 611, 630 (7th Cir. 1992) (Easterbrook, J., concurring).

C. The State's Argument Subjects Religious Speakers to Special Disablities.

The "perceived endorsement" argument represents a unique danger to religious speech rights. By finding Establishment Clause violations even where the state has done nothing to aid, encourage, sponsor, support, or endorse religion, the argument blurs the line between state and private action and in the process restricts religious freedom and free speech. Because governmental endorsements, perceived or otherwise, of subjects other than religion are not normally thought to be of constitutional concern, the perceived endorsement test targets religious speakers for special disabilities not imposed on other speakers. The test really is nothing more than a rationalization for censoring private religious speech. As such, the "perceived endorsement" argument disserves both the Religion Clauses and the Free Speech Clause because it restricts private action and cabins religious freedom and free speech by denying religious adherents the same right to speak that other citizens have.

The discrimination against religious speakers cuts against the thrust of cases such as *Widmar, Mergens,* and *Lamb's Chapel*, all of which rejected attempts to treat religious speakers less favorably than other speakers. The Establishment Clause neither requires nor justifies the discrimination the perceived endorsement test would perpetuate. As *Mergens* made clear, '"The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.'" 496 U. S. at 248 (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in the judgment)).

Justice Brennan, in his concurrence in *McDaniel,* succinctly summed up the reasons why this Court should reject the "perceived endorsement" argument:

> Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally. The Establishment Clause. . . may not be used as a sword to justify repression of religion or its adherents from any aspect of public life.

McDaniel, 435 U. S. at 641. The state, by its "perceived endorsement" test, is attempting to use the Establishment Clause as a "sword to justify repression of " the Klan's religious expression. This Court should remove the blade from that sword by rejecting the "perceived endorsement" test and hold, as the Sixth Circuit did, that private religious speech in a public forum cannot violate the Establishment Clause.

CONCLUSION

This Court should affirm the Sixth Circuit's decision that private speech in a public forum does not violate the Establishment Clause. Merely allowing private speech in a public forum is not state action subject to constitutional scrutiny. In any event, the Establishment Clause does not justify censorship of private religious speech based on the state's fear that some uninformed observer may not understand that the state is not endorsing that speech by failing to censor it.

Respectfully submitted,

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